Office-Supreme Court, U.S.
FILED
SEP 15 1983
ALEXANDER L. STEVAS,
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No. 82-1845

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

PETITIONER'S REPLY BRIEF PURSUANT TO UNITED STATES SUPREME COURT RULE 22.5

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The respondent alleges that the trial court's decision in this case was based upon a determination that the affiant lied or recklessly disregarded the truth. [Brief in Opposition, 7-10]. However, the statements made by defense counsel, by the trial court and by the Colorado Supreme Court in its decision demonstrate that the affiant's veracity was not at issue in this case.

Near the beginning of the suppression hearing, defense counsel stated:

> We're not questioning the affiant's credibility, Sergeant DeNovellis' credibility...[Transcript of hearing of September 9, 1982, hereinafter "T." 13].

Later in that hearing, defense counsel attempted to retreat from this absolute statement:

> My statement about Sergeant DeNovellis - I have no information at this point or presented to the

> court he intentionally made any misstatements. I think if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would get to the heart of the motion to suppress and, second of all, that there was recklessness on the part of the affiant in not verifying the information or checking out the information. [T. 15-16].

However, the trial court then clearly stated that the affiant's truthfulness was not in dispute:

> I'm not concerned about Detective DeNovellis' credibility. I don't think that's in question at all. [T. 18].

The Colorado Supreme Court focused its opinion in this case upon the prosecution's argument that the trial court should not order the State to disclose the informant's identity because both defense counsel and the trial court had conceded that the affiant's credibility was not contested. The Court held:

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of People v. Dailey.' Dailey recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good-faith mistake of either the officer or the informant."...When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the District Court. The necessary foundation for the District Court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. [Citation omitted; emphasis supplied] [Petition for a Writ of Certiorari, A-6-7].

In other words, the Colorado Supreme Court held, in opposition to the precedent established by the United States Supreme Court, that a trial court could order the State to disclose an informant's identity even if the accused

only attacked the informant's, and not the affiant's, credibility. Contrary to the respondent's argument (Brief in Opposition, 8-9), this analysis, which was applied in this case, is an improper standard. Although the respondent urges otherwise, defense counsel, the trial court and the Colorado Supreme Court all remove the issue of the affiant's credibility from the calculus that a trial court must follow when it decides whether to disclose a confidential informant's identity. In doing so, the Colorado Court, relying upon the United States Constitution, has erased this Courts's careful historical development of the law that surrounds confidential informants.

Respectfully submitted,

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